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**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| In re | ) | Chapter 11 |
| Delphi Corporation, et al. | ) | Case No. 05-44481 (RDD) |
| | ) | Jointly Administered |
| Debtors. | ) | |

**EMERGENCY MOTION OF APPALOOSA MANAGEMENT L.P. FOR ENTRY OF AN ORDER STRIKING THE EXPERT REPORT AND DIRECT TESTIMONY OF KEITH S. WILLIAMS**

TO: THE HONORABLE ROBERT D. DRAIN,
UNITED STATES BANKRUPTCY JUDGE:

Appaloosa Management L.P. ("Appaloosa"), collectively with and through certain of its affiliates, owning beneficially approximately 9.3% of debtor Delphi Corporation's ("Delphi") issued and outstanding shares, respectfully submits this memorandum in support of their motion to strike the written direct testimony and expert opinion of Keith S. Williams:

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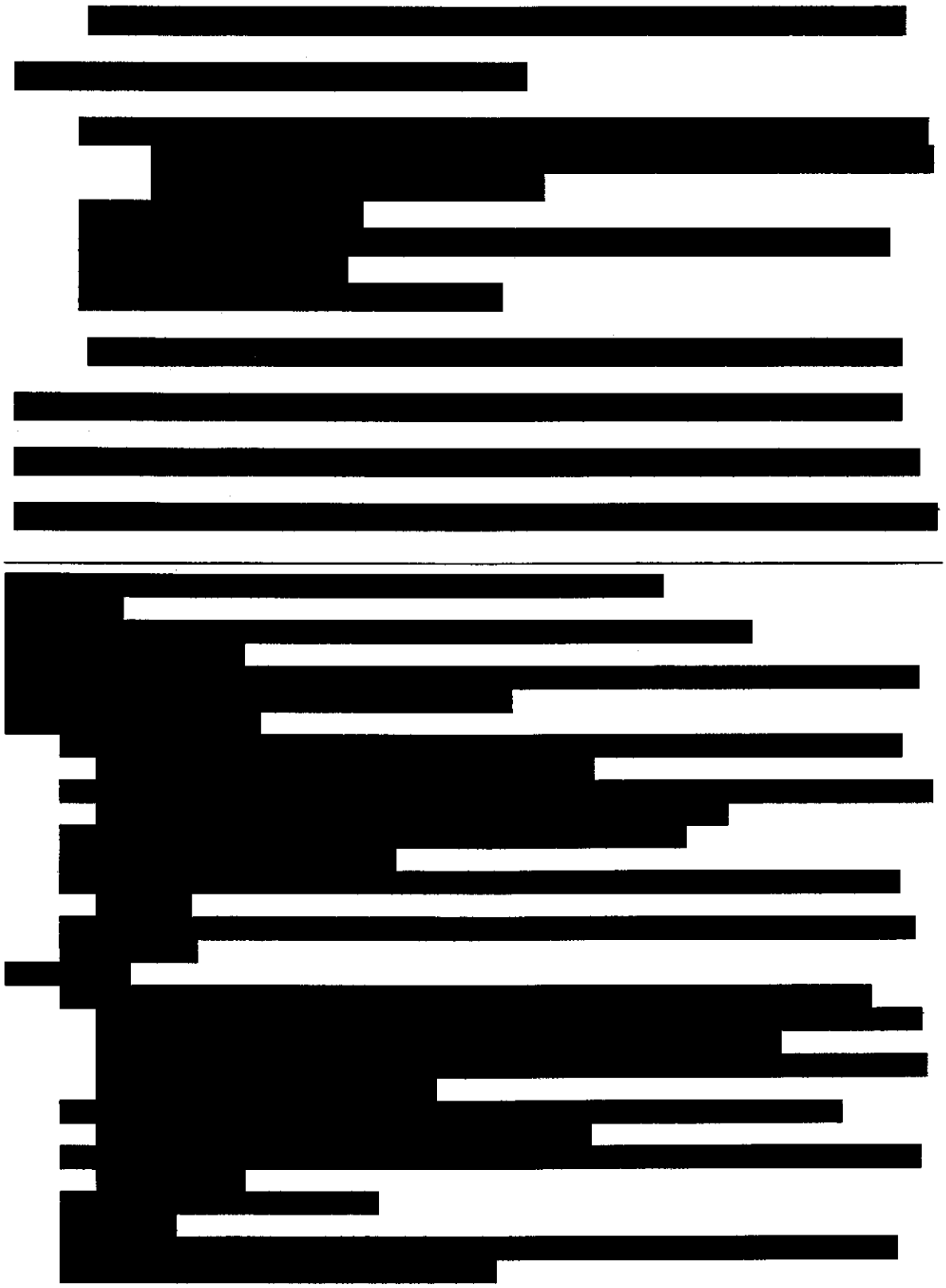

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[redacted]

5. Information concerning offers made by Delphi or the unions may indicate either (1) that Delphi is seeking concessions that, if accepted, would create value for the equity holders of Delphi, or (2) that the unions have already put on the bargaining table sufficient concessions that would create value for the equity holders of Delphi. In either scenario, such information is directly relevant to the issues relevant to Appaloosa's motion.

6. It is well-settled law in this Circuit – and indeed a basic concept of fairness – that a party cannot make assertions based on a set of facts exclusively within its knowledge and refuse to permit inquiry into those facts. If Debtors wish to attack Appaloosa's experts' reports for making "speculative" assumptions about potential outcomes of the labor negotiations between Delphi and its unions, they cannot simultaneously refuse to disclose the actual nature of negotiations between those entities. The Court should therefore strike Mr. Williams' written report and declaration, thereby precluding his direct testimony.

## ARGUMENT

### The Court Should Strike Mr. Williams' Expert Report Because Debtors Challenge Appaloosa's Experts' Assumptions As Unreasonable Without Permitting Inquiry Into Facts Relevant To Determining Their Reasonableness

7. The law is clear that, absent a privilege, instructions not to answer questions at a deposition are generally impermissible. The Federal Rules of Civil Procedure state that "[a] party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion" seeking to limit the scope of a deposition conducted in bad faith or in an unreasonably annoying, harassing or oppressive manner. Fed. R. Civ. P. 30(d)(1) (emphasis added). Absent one of the exceptions

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stated in the rule, "instructions not to answer questions at a deposition are improper." Gould Investors, L.P. v. The General Insurance Co. of Trieste & Venice, 133 F.R.D. 103, 104 (S.D.N.Y. 1990). As none of the exceptions to that general rule apply to Debtors' instructions, it was clearly improper for them to have instructed the deponent not to answer.

8. It is a fundamental rule of fairness that a litigant who wishes to rely on information entirely within its knowledge must disclose that information to its adversary. This rule has been routinely reaffirmed in this Circuit where parties have asserted the defense of "advice of counsel" while simultaneously claiming attorney-client privilege over that advice. For example, "[w]here a party in a patent infringement action asserts the advice of counsel as a defense to a claim of willful infringement, it waives the attorney-client privilege as to the subject matter of the advice received." Convolve, Inc., v. Compaq Computer Corp., 224 F.R.D. 98, 102 (S.D.N.Y. 2004). The Convolve court explained that, "[t]he rule seeks to promote fairness, . . . since 'it would be fundamentally unfair to allow a party to disclose opinions which support its position, and simultaneously conceal those which are adverse.'" Id. (citations omitted, emphasis added); see also Oxyn Telecommunications, Inc. v. Onse Telecom, 2003 WL 660848 (S.D.N.Y.) at *6 ("'a privilege may be impliedly waived where a party makes assertions in the litigation or asserts a claim that in fairness requires examination of protected communications.'") (citations omitted). Simply, fundamental fairness does not permit a realm of non-disclosure that includes issues put into dispute by the party seeking to prevent disclosure.

9. Just as in cases where a party seeks to raise the content of attorney-client communications as a defense, while simultaneously refusing to disclose that content on grounds of privilege, Debtors offer the testimony of Williams to challenge the reasonableness of scenarios proposed by Appaloosa's experts concerning potential outcomes of negotiations between Delphi and its unions, while refusing to disclose the nature of those negotiations. To

allow Debtors to attack the reasonableness of opinions of Appaloosa's experts while they fail to disclose information which might very well justify the assumptions made by the experts – is patently unfair.[4]

**WAIVER OF MEMORANDUM OF LAW**

10. Pursuant to Local Bankruptcy Rule for the Southern District of New York 9013-1(b), because there are no novel issues of law presented herein, Appaloosa requests that the Court waive the requirement that Appaloosa file a memorandum of law in support of this Motion.

[4] Indeed, as set forth in footnote 1, there is good reason to believe that the information sought by Appaloosa concerning Delphi's labor negotiations would tend to confirm, rather than challenge, the reasonableness of the assumptions made by Appaloosa's experts.

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## CONCLUSION

11. For the foregoing reasons, Appaloosa respectfully requests that this Court strike Williams' written report and his direct testimony, thereby precluding Williams from testifying.

Dated: March 20, 2006
Miami, Florida

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